IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

THE ST. LOUIS SMELTING AND REFINING CO.,
PLAINTIFF IN ERROR,
vs.
SARAH RAY, C. CHRISTOPHER, C. A. LOCK AND F. F. BRUNE,
DEFENDANTS IN ERROR.

No. 459.

In Error to Circuit Court, District of Colorado.

Statement of the Case.

The plaintiff is the grantee of Thomas Starr, who claims title from the United States by virtue of a patent for a placer mining claim of 164 $\frac{61}{100}$ acres, and brought suit in ejectment against the defendants. The court below held that the patent was void upon its face.

The plaintiff introduced in evidence a patent from the United States to Thomas Starr, dated March 29th A. D., 1879, for 164 $\frac{61}{100}$ acres, unsurveyed lands, against the objection of the defendants that it was void upon its face.

Also a certificate from the Register of the Leadville Land Office that Thomas Starr made an application to enter the claim on the 18th of March, 1878, that subsequent proceedings were legal, and that he paid for the same on the 6th day of March, 1879.

Also, deeds from Thomas Starr to Aug. R. Meyer, April, 1879, and from Meyer to plaintiff, April 17, 1879.

Also, deed from Thomas Starr to plaintiff, dated August 27, 1879, for 31 $\frac{60}{100}$ acres, for the purpose of showing that the possessory title was in plaintiff to this property.

The defendants introduced record evidence from the Land Office to show that the proceedings for a patent were void, because among other things it included more land than allowed by law to be located and patented by one claimant.

They offered:

1. The mining application notice, dated March 18, 1878, for 164 $\frac{61}{100}$ acres.

2. Proof of publication from March 23, 1878 to June 1, 1878.

3. Application for patent. Sworn to March 15, 1878.

4. Survey made October 5, 1877.

5. Affidavit of citizenship, that Thomas Starr was born in Ireland, but landed in America at the age of sixteen years. Sworn to March 15, 1878.

6. Declaration of intention to become a citizen. Sworn to July 3, 1878.

7. Abstract of title including deeds and locations.

8. Leases made by plaintiff to sundry persons in 1878, and plat of plaintiff's addition to Leadville, covering most of the land conveyed by Starr to plaintiff in 1877.

The defendants also introduced parol testimony to show that plaintiff had laid off the entire tract, conveyed to it by Aug. R. Meyer, April, 1879, as an addition to the town of Leadville, this being part of the tract deeded to it by Thomas Starr, August 27th, 1877.

The plaintiff, in rebuttal, offered to introduce additional evidence "to show that the ground was purchased for the sole and only purpose of erecting smelting works thereon

in the Spring of 1877, and that such smelting works were erected thereon and completed thereon before October, 1879." (P. 113, printed record.)

The evidence from the records of the Land Office show but one location certificate made prior to 1874, that of C. W. Floyd et al., in Floyd claim, for 1,500 × 500 feet, five mining claims. (pp. 79, 80, printed record).

A. B. Wood and three other claimants located 20 acres each, on the 21st of September, 1874. (p. 79, printed record.) They were located as placer claims "No. 1, P." (p. 79, printed record.)

A. B. Wood and W. H. Stevens conveyed to Aug. R. Meyer, July 20, 1877, a portion of their location, about 666 × 1,000 feet. (p. 85, printed record.) The remaining locations and re-locations were made in 1877. Julius Schultz, April 13, 1877, May 19, 1877, (pp. 80, 82.) Aug. R. Meyer et al., April 21, 1877, May 19, 1877, June 19, 1877, (pp. 81, 82, 83.) Geo. L. Henderson, May 3, 1877, (p. 81.) A. J. Hill, Aug. 8, 1877, (p. 84.) Thomas Starr and James McPhelemy, Jr., Aug. 23 and 24, 1877, (pp. 86, 87.) Peter Starr et al., Aug. 28, 1877, (p. 96.) Thomas Starr, re-locations, Aug. 30, 1877, and Dec. 12, 1877, (pp. 93, 97.)

The survey made October 5, 1877, was based on Starr's re-location certificate of August 30, 1877, which claimed $170\frac{7}{10}$ acres.

The location notices, application, survey, filing of plat and publication of notice were made before Starr had made a declaration of intention to become a citizen, and were nullities on that account. The officers were without jurisdiction to receive his application and publish notice. The deed from Starr to the plaintiff was made while he was an alien, and could confer no possessory rights upon plaintiff.

The Floyd placer claims having been re-located in 1877, the entire ground included in the patent was located under the act of Congress of 1872, and under the Colorado statutes.

No locations were made under the Act of 1870. The Floyd location was made when the Act of 1866 was in force, which limited the claims to 200 feet in length for each person, and a double amount to the discoverer.

The Floyd locations are described in Floyd's deed to Schultz as No. 2 to 6, which shows that each locator took 100 × 500 feet in each claim, thus making the area of each claim 300 × 500 feet.

The Floyd placer claims were located in a rectangular form, 300 × 500 feet, or 100 × 500 feet to each claimant.

Peter Starr bought 23 claims of Bradshaw, May 21, 1875, (p.100, printed record.) He, with James McPhelemy, Jr., and Roger McPhelemy filed a fragment of a re-location certificate Aug. 30, 1877, for 58.03 acres of land, or less than twenty acres each. These were re-locations of the Bradshaw claims, and make the area of each claim about 2½ acres. Thomas Starr conveyed, July 5, 1877, to Aug. R. Meyer, a claim whose side lines were 503 and 539.5 feet, and the end lines 136 and 300 feet, containing about 2½ acres (p. 84 printed record).

The location of the Placer claim, "No. 1, P." by A. B. Wood, John B. Crawford, R. J. Wood, and Joseph B. Wood, was eighty acres, or twenty acres each. A. R. Meyer, Albert Holtz, Geo. L. Henderson, and David Copeland jointly located, April 21, 1877, a claim 800 × 1,000 feet (p. 81, printed record). May 3, 1877, Geo. L. Henderson located a claim 300 × 500 feet (p. 81, printed record). May 19th, 1877, Aug. R. Meyer, S. D. Breece, Geo. Henderson, and W. H. Bradt jointly located 19.95 acres (p. 82, printed record). Also, a claim for 10 acres. Also, June 19, 1877, 27.60 acres (p. 83, printed record). A. J. Hill, Aug. 8, 1877, relocated a claim of $4\frac{87}{100}$ acres (p. 84, printed record). Julius Schultz, Aug. 8, 1877, located a claim of $10\frac{6}{10}$ acres of placer land (p. 85, printed record). Also, 99-100 acres (p. 86, printed record).

Thomas Starr's relocation, August 30, 1877, recites that it was made "for the purpose of better defining and locating and consolidating the several claims," and relocated the claims, and described them as one claim, with such a description by course and distance that the several claims are none of them distinguishable, and under the Colorado statute the certificate is void.

To identify the land sued for as covered by the Starr patent, it was necessary to prove it by the surveyor, who laid off plaintiff's lands in town lots. He swore that the land in question was part of that conveyed by Thomas Starr to Meyer, and Meyer to plaintiff. Starr's deed of August 27, 1877, to plaintiff conveys the identical ground deeded by Meyer to Starr, August 27, 1877, as relocated by Aug. R. Meyer, August 24, 1877. (pp. 88–89, printed record.)

It was thus proved that the lots possessed by defendants were part of Aug. R. Meyer's relocation of August 24, 1877. This relocation comprised the land bought of Starr, May 31, 1877—about 2½ acres, the record not showing when it was located; the land bought of Schultz, May 30, 1877, part of the Floyd placer 500 × 500 feet, about 5 7-10ths acres, and part of Wood's placer claim, "No. 1, P.," about 15½ acres, bought July 17, 1877. This leaves about 8 acres covered for the first time by Meyer's relocation certificate, on the 24th of August, 1877.

The record evidence from the Land Office does not show a single location of 160 acres by any claimant; but does show that the locations in 1868 were rectangular in form, and covered an area of 300 × 500 feet; that the Bradshaw locations made prior to 1875 were for about 2½ acres each; that the remaining original locations did not exceed twenty acres for each claimant; and that in no case did a single claimant make a relocation in excess of twenty acres, except the relocations of Aug. R. Meyer and Thomas Starr, from whom plaintiff derives title.

The statute of 1872 provided that "all placer-mining claims located after the tenth day of May, 1872, shall conform as near as practicable with the United States' system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands." R. S., sec. 2231.

This rule required the locations for placer mines to be rectangular in form, if possible, and not to exceed twenty acres for each individual claimant. A patent therefore, which recites that it is issued pursuant to the Revised Statutes of the United States, to one claimant for $164.\frac{61}{100}$ acres, and which is not rectangular in form, is void, for facts appearing on its face.

The record shows that eight of the location certificates were relocations under the Colorado Statute, which, in sections 1823 and 1826, refers to all mining claims, and is as follows:

Colorado Laws, R. S., 1877.

[Session Laws, 1874.]

"SEC. 1823, (Sec. 13). If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim, which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator or his assigns, may file an additional certificate, subject to the provisions of this act: *Provided*, That such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location.

"1826. SEC. 16. No location certificate shall claim more than one location, whether the location be made by one or several locators. And if it purport to claim more than one location, it shall be absolutely void, except as to the first location therein described, and if they are described together, or so that it cannot be told which location is first described, the certificate shall be void as to all."

General Statutes of Colorado, pp. 631, 633.

This statute does not provide for the consolidation of locations in any case. It permits the changing of surface boundaries, or taking in any part of an overlapping claim which has been abandoned. The identity of the original claim by name and initial corners, and natural monuments, is required to be retained, so that the relocation will better identify the land covered by it, the same rule under the Colorado Statute applying to placer claims which governed lode claims.

The act of 1870 left the location of placer claims made on unsurveyed lands to be governed by the law of 1866. The law of 1872 provides that proceedings for a patent for placer claims should be the same as for lode claims; but that all placer claims thereafter located should conform as near as may be to the rectangular sub-divisions of public surveys, and no such location shall include more than twenty acres for each individual claimant.

Section 10, Act of 1872.

This required a specific location of each claim. The acts of 1866 provided for no consolidation of locations. The act of 1870 provided for joint entry of claims upon surveyed lands, but this was to be made by two or more persons. It did not provide for the consolidation of locations prior to survey.

The Colorado Statute of 1874 provided for re-locations, of former defective locations, but prohibited consolidation of locations.

The re-location certificate of Peter Starr et al., dated Au-

gust 28, 1877, is but a fragment, and does not comply with the law of 1872, nor with the Colorado Statute. The name of the prior location, and the initial point and course and distance for eight corners, are wanting in the record.

The re-location of Aug. R. Meyer of August 24, 877, covers 31.60 acres, and includes parts of three claims. It is void under the Revised Statutes of the United States, and the laws of Colorado.

The location certificate of Thomas Starr, Aug. 30, 1877, covers 170.7 acres, includes several claims, and is void on its face under the Statutes of the United States and of Colorado.

Exceptions and Errors.

The exceptions in this case and in that of No. 458, are essentially the same, and errors are assigned in the brief of Britton and Gray, as follows:

"1. The court below erred in overruling the objection made by counsel for plaintiff to the introduction by defendants of the record of proceedings in the Land Office upon which Thomas Starr obtained his patent, and in admitting the same to be read in evidence for the purpose of impeaching the patent.

"2. The court erred in instructing the jury, that no patent for a placer claim since 1870, could in any case exceed 160 acres; and could only be so much in the case of an association of persons.

"3. The court erred in instructing the jury that the owner by purchase of a number of valid locations must prosecute separate patent proceedings upon each location in order to obtain a valid patent; that it is not lawful for him to prosecute one application upon his consolidated purchases, nor lawful for the land officers to allow the same, and that no valid patent could issue thereon.

"4. The court erred in instructing the jury, that the patent upon which plaintiff relied was void, and that plaintiff's title failed."

The charge of the court below was as follows:

"We have come to an understanding about the law in this case which will relieve you from any attentive consideration of the evidence. The plaintiff brings this action against the defendants to recover certain lots in the town of Leadville, and of course, assuming the affirmative in relation to that matter, the defendants being in possession of the property, and resisting the plaintiff's claim, it is upon the plaintiff to show title to the property by a preponderance of evidence. Upon that point, the plaintiff has introduced a patent issued to one Thomas Starr for a placer claim, covering 164 $\frac{61}{100}$ acres, and upon that a question is presented as to whether a patent for so much land can be issued under the laws of Congress, as they now stand, to one person. Upon examining the law we find in the first place, that an act was passed, July 9, 1870, the first one passed by Congress giving authority to obtain titles from the Government for placer claims, and in that act it was provided, in the way of an amendment to a previous act which had been passed respecting lode claims, that persons having a right to such could obtain title thereto under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims; and it was provided in the same section of the act, that no location of a placer claim hereafter shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys. That clause of the act put individuals and associations of persons upon the same footing: [that is to say, subject to the local rules of the different mining districts, they could obtain title for one hundred and sixty acres of land as a placer claim, if the local rules would admit of their taking so much. If the local rules restricted them to a less quantity, then they would have to conform to the local rules. The provision is that the claim shall not exceed one hundred and sixty acres; it may be smaller if the local rules so provided,]* and the provision, as you may have noticed, as I gave it to you in the first place, is that they may obtain the entry and patent under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims. Now an

* The portion in brackets constituted the plaintiff's first exception to the charge of the court.

act of Congress was passed in 1866, prescribing the conditions upon which a title could be obtained for lode claims. * * * In 1872, another act was passed upon that subject, which was somewhat different from that of 1866, but so far as it relates to the matters we have under consideration at this time, we may say it was substantially the same. It required that the persons desiring to obtain a patent for land claimed for mining purposes, should file an application for patent, a plat and field notes of the claim, in the local land office, and should post a copy of the plat, together with a notice of his application upon the claim, and should publish a notice of his application, and so on in order to give the other claimants who might have some rights to the property, an opportunity to come in and show the right, and contest with him the question of ownership if they desired to do so. And that act contains similar provisions in regard to placer claims also; provisions, which in fact were designed to take the place of that of 1870, to which I have called your attention, and I believe it does not wholly repeal the act of 1870, and perhaps it left some of the provisions of that act still in force." *Copp's Mining Decisions*, pp. 382, 383.

Then follows the portion constituting plaintiff's second exception to the charge:

"But taking the two acts together, the act of 1870 and the act of 1872, it is to be said that it was required of a claimant for a placer-claim that he should post a notice upon his claim, and that he should give notice by publication, and that he should show that improvements had been made upon the claim, as required by the act of 1872. And that law was in force at the time the patent was applied for, at the time it was issued, and is still in force—so that it has become a question whether the patent which is before you was issued in accordance with these provisions of law. *Now upon that we have to say that it was not*, because, as we have ascertained from an examination of the patent, and from some of the testimony that has been received with it (the testimony of the proceedings in the Land Office), this was an application made since the year 1870, since this act was passed, upon several claims (twelve or fifteen, perhaps, was the number), and these claims are all embodied in this one claim which is described in the patent. The application

appears to have been made as for one claim, and embodying twelve or fifteen locations that were made at different times—from perhaps 1865, or some time prior to the year 1870, up to the year 1877—and these were all embraced in one claim and one application, and the land office has issued a patent upon that for one claim. Now this, we say, was not in conformity with the acts of Congress. If there were twelve or fifteen claims, it was incumbent upon the applicant, Mr. Starr, to show his right to each of these claims, to have each of them surveyed, to have the notice posted upon each, to give notice by publication, and take the same proceedings as to each one of these claims. If he had done so, it would be no objection that he had purchased some of them from the first locator, or from the grantees of the first locators, or that perhaps he had located others of them himself. We would not inquire how he acquired the right to these several claims, if he had taken the steps which the law required of him as to each one of them; but not having done that, having attempted to embody all of these claims in one application, and having made it substantially one claim, the proceeding was entirely irregular under the statute. If it had appeared that this application was made for one claim located before the year 1870, in pursuance to the rules of California mining district, then his application would have been regular, if the local rules of California mining district existing before the passage of this act of 1870 had provided that one person might hold so much as 164.61 acres. If this claim had been taken according to the local rules at that time, then his application would have been regular and proper; but, as I stated to you before, we have ascertained that the application was not of that character—that there are a number of claims consolidated in one, or one application made upon all these claims for a quantity of land in excess of that which may be taken by an individual under these acts of Congress. For that reason we declare, as a matter of law, that this patent is void, and upon that the plaintiff fails altogether."

The plaintiff's third exception was to the following portion of the charge:

"But upon what I have said to you in respect to this

patent and its validity, we find no title whatever in the plaintiff to this tract of land, and therefore it has become your duty, gentlemen, to return a verdict for the defendants." (pp. 114, 115, Printed Record.)

Argument and Brief.

I.

The first error assigned is that the court erred in admitting in evidence the record from the land office.

The court had admitted in evidence the patent, which recited that it was made in conformity with the Revised Statutes of the United States, in pursuance of an entry made March 6, 1879.

Also, a certificate of the Register of the Land Office at Leadville, Colorado, that Thomas Starr, on the 18th of March, 1878, applied to enter the Starr Placer Claim, "and that such proceedings were thereafter had in this office *in accordance with law*, that on the 6th of March, 1879, the said Thomas Starr entered and paid for the said mining claim." (p. 26, Printed Record.)

To show possessory right, the plaintiff introduced in evidence a deed from Thomas Starr to plaintiff, dated August 27, 1877, for the identical placer claim relocated by Aug. R. Meyer, August 24, 1877, (pp. 52, 88, Printed Record,) and offered to show that it had possession of the ground, and commenced the erection of smelting works in June, 1877.

This land was proved also by a surveyor to be part of that covered by the patent to Starr.

By this evidence the question whether Starr's patent was issued in conformity with law, whether he had possession at the time he applied for patent, and whether he was entitled to apply for patent at all at that date, and the land officers authorized to take jurisdiction of his application, were opened, and the defendants had a right to introduce counter evidence from the files of the land office to prove

want of title and possession in Starr, at the time he made the application for patent.

On examining this evidence it will be seen that the ground in controversy is part of Aug. R. Meyer's relocation made August 24, 1877, (p. 88, Record,) sold to Thomas Starr August 27, 1877, (p. 88, Record,) and sold by him the same day to the plaintiff. (p. 52, Record.) This relocation of 31 61-100 acres was made in violation of law, being for more than 20 acres.

This location was void under the Colorado statutes, as it was a combination of the lots purchased by Meyer. May 31, 1877, Meyer bought of Starr, (p. 84 printed record,) about 2½ acres; May 30, 1877, Aug. R. Meyer (500×500 feet) bought of Schultz, (deed on p. 84 printed record,) about 5.7 acres; and on the 17th of July 1877, he bought of Wood and Stevens, (p. 85 printed record,) about 15½ acres. The record does not show when Starr made the location of the claim he sold to Meyer, nor from whom the eight acres unaccounted for in Meyer's claim of title was purchased if previously located. It shows that the claim bought of Scultz was one-third of the Floyd Placer claims, located in 1868, by three persons, each locating 100×500 feet. This location shows, or tends to show, what was considered the extent of a placer claim at that time. The relocation certificate of Meyer covered Starr's claim, one-third of the Floyd Placer claims, about one-fifth of the Wood and Stevens Placer, and eight acres taken in by relocation. This relocation certificate is, in direct violation of Sec. 1826, Statutes of Colorado, as it combines the old locations together, and describes them as one, which makes the certificate void as to all.

II.

The record shows that Starr, when he conveyed to Meyer and to the plaintiff, was an alien, and did not declare his intention to become a citizen until July 3, 1878. He could

not hold, possess, or convey mining claims, and could neither make a location certificate, nor an application for patent. But if it be held that a declaration of intention is retroactive, and removes the bar of the law as to his void acts, then it cures the deed made by Starr to the plaintiff, and proves that Starr did not have the possession of the land sued for in this action at the time he made application for patent and that his sworn application contains these false and fraudulent statements:

1. That he is a citizen of the United States.

2. That he "is in the actual, quiet and undisturbed possession of, and is entitled to, the possession of 164,61 acres," which included the land sold to plaintiff and then possessed by it. These false statements vitiate his patent, and when the fact that Starr was out of possession at the time he made his sworn application for patent is introduced in evidence by plaintiff, a court of law has jurisdiction to declare the patent void at law; for the plaintiff had notice of record, after the application was filed, that Starr was an alien, and that Meyer's and Starr's relocations were void.

It may be claimed that these false statements do not impeach the patent in a suit at law. But when the plaintiff introduced in evidence the certificate of the Register that all the proceedings for patent were in accordance with the law, and also the deed from Starr to plaintiff, and other proof of possession, it was competent for the court to admit in evidence the proceedings in the Land Office as the best evidence of what was done.

These points were decided in *Insurance Company* vs. *Newton*, 22 Wall., 35, in these words:

"Every admission is to be taken as an entirety of the fact which makes for the one side, with the qualifications which limit, modify, or destroy its effect on the other side.

"When the plaintiff was permitted to show what the agent and officers of the company admitted the proofs

established, it was competent for the company to produce the proofs thus referred to and use them as better evidence of what they did establish."

III.

The record evidence from the Land Office not only proved the date when the relocations of Meyer and Starr were made, but showed that they were in violation of law, in including in their boundaries more than one location and more than twenty acres for one claimant. Under the law Starr could obtain a patent for but twenty acres in one location, and as he made jointly with James McPhelemy, Jr., a location of 36 36-100 acres, August 9, 1877, and of 5 acres on the 23d of August, 1877, he was not entitled to include in his patent any land outside of those locations. As his patent does include other lands in excess of the amount he could legally locate, the patent is void on its face.

In *Tameling* vs. *U. S. Freehold, &c., Co.*, 3 Otto. 661, it was contended that the patent was void because it included more than eleven square leagues, the area of a Mexican grant, and the court held that the patent conformed to the confirmation by Congress and was not void. But that if the patent had been for more than can be granted, "inasmuch as no specific portion of the land within those boundaries was severed from the remainder, and confirmed to the claimant, the plaintiff below who derives title from him has not shown a right to the demanded premises, and the judgment must be reversed."

This is an affirmance of the rule in *Patterson* vs. *Winn*, 11 Wheat., 381, 385, in which it is held that if the statutes of Georgia prohibited the issuing a grant to one person of more than 1,000 acres of land, the grant in question being for 7,300 acres, is void; and "if the statutes referred to will warrant this construction, the objection was well taken, *and can be sustained in a court of law*."

No one will pretend that a homestead patent for 320 acres of land would be valid, when the law expressly limits the homestead to 160 acres; and the courts would not hold such a patent to be "regular on its face." While a settler on unsurveyed lands may make a declaratory statement under the pre-emption laws, and change that to a homestead application, he must conform his selection as near as possible to the Government surveys, and must claim four forties, each located in a rectangular form. He cannot select the land in an irregular form, and with such variations from straight lines as to select the good lands in a section and exclude the poor lands. A homestead or pre-emption patent, therefore, which contained eighty-four side lines, and eighty-four corners, would be irregular on its face.

In an action of ejectment, such a patent would not be conclusive evidence of title. In *Gibson* vs. *Chouteau*, 13 Wall., 102, it is held: "But, in the action of ejectment, in the Federal courts, the legal title must prevail, and *the patent, when regular on its face, is conclusive evidence of that title.*"

IV.

Again, the evidence was admissible to show want of power in the officers of the Government to issue the patent at the time it was issued. No patent can issue for mining lands, unless the claimant has located and possessed the lands under the provisions of the mining laws of the United States; and, under Sec. 2,325, U. S. Rev. Statutes, the Register has no jurisdiction to publish a notice of application for patent for any mining claim, unless it has been located and improved by a citizen of the United States, or by one who has declared his intention to become a citizen, and has procured a survey and filed his sworn application in the Land Office. If the applicant has not declared his intention to become a citizen, he has no possessory rights in the mineral lands of the United States. He is, by law, excluded

from possession, and is simply a trespasser. His torts in possessing and working claims confer no jurisdiction on the Register to receive his application.

"Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority."

United States vs. *Stone*, 2 Wall., 535.

The same rule was held in *Riley* vs. *Welles*, December Term, 1869, where it was held that as the pre-emptor "entered upon the lot in 1855 without right, and the possession was continued without right, the permission of the register to prove up the possession and improvements, and to make the entry under the pre-emption laws, were acts in violation of law, and void, as was also the issuing of the patent." 318

Also, in *Stoddard* vs. *Chambers*, 2 How., it was held:

"Now, an act under a law means in conformity with it; and unless the location of the defendant shall have been made agreeably to law, or the patent were so issued, the reservation does not affect the title of the plaintiffs."

"No title can be held valid which has been acquired against law; and such is the character of defendant's title, so far as it trenches on plaintiff's. It has been argued that the first patent appropriates the land, and extinguishes all prior claims of inferior dignity. But this view is not sustainable. The issuing of a patent is a ministerial act, which must be performed according to law. A patent is utterly void and inoperative which is issued for land that had been previously patented to another individual. The fee having been vested in the patentee by the first patent, the record could convey no right. It is true a patent possesses the highest verity. It cannot be contradicted or explained by parol; but if it has been fraudulently obtained or issued

against law, it is void. It would be a most dangerous principle to hold that a patent should carry the legal title though obtained fraudulently or against law. Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a patent. The patent of the defendant having been for land reserved from such appropriation, is void; and also the survey of Coontz, so far as either conflicts with the plaintiff's title."

This was a suit in ejectment, where the court below instructed for the defendant on the ground that the patent conveyed the title, and was a defense to the suit. The Supreme Court reversed that decision.

A sale of land by the President in violation of the provisions of a treaty declared void, for want of power in the President to make it.

Ladiga vs. *Roland*, 2 How., 590.

This was a suit at law, where the patent was held to convey no title.

To the same effect are the following cases in ejectment:

Easton vs. *Salisbury*, 21 How., 431;

Best vs. *Polk*, 18 Wall., 117.

Wirth vs. *Branson*, 8 Otto, 121.

Where certificates of entry were obtained illegally, it was held:

"It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated, are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, *and this want of power may be proved by defendant in an action at law.*"

Morton vs. *Nebraska*, 21 Wall., 674.

The reason why a patent is deemed proof of a valid vested

* There is jurisdiction at law, and not in equity. Smith at Mc Ivor, 9 Wheat. 533, 534.

interest in land is because it dates back to a valid entry. In the case of *Stark* vs. *Starr*, 6 Wall., 418, Stark had settled upon, improved, and surveyed his lands. The lands embraced by his claim had then ceased to be the subject of purchase from the United States by any person, natural or artificial. The right to a patent once vested is treated by the Government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants.

To the same effect are—

Barney vs. *Dolph*, 7 Otto, 656;
Simmons vs. *Wagner*, 11 Otto, 262.

The vested right of Starr to his location of a placer-claim did not exist at the date when he made application and procured a survey. All the proceedings prior to July, 1878, were illegal and void. The entry, being based on void application and void publication notice, was also illegal and void—as no legal steps had then been taken by Starr to locate and possess the claim or make proof of possession. There had been no compliance with law. His affidavits of possession were false. His declaration of intention could not convert his trespass upon the lands into a legal right to the possession, as that a person who had renounced foreign allegiance, any more than it could convert an illegal ballot cast by an alien into a legal ballot, if the voter, pending a contest in the election, declared his intention to become a citizen.

The mining laws did not throw open the mineral wealth of the public lands to aliens, to be claimed, held, and possessed by them as long as they chose to do a certain amount of work upon the claim each year, until the mine is exhausted. Such a construction would put it in the power of aliens to confiscate the mineral wealth of the nation to the exclusion

of its citizens, if they made the first entry upon the land. The law did not intend such a wrong, and does not protect it by making a declaration of intention retroactive.

Where the State statute permitted citizens, or those who should become such, to enter State lands upon subscribing the oath of allegiance prior to making the entry, it was held: "That an entry by one who had not taken such oath was invalid, and not rendered valid by his subsequently taking the oath."

Thompson vs. *England*, 1 Hawkes, (N. C.) 137.

An alien who has not declared his intention of citizenship was denied the right to settle on public lands, on the ground that "he had no more right to make said entry than any other subject of England."

Case of McDevitt, Land Office Report, 1877, p. 93.

A patent obtained by an alien in violation of law was held invalid and not cured by subsequent naturalization.

Opinion of GRIER, J., in *Minis' Assignee* vs. *Adams*, 3 Wall. Jr., pp. 29–30.

Aliens can hold no title in mining claims prior to the issue of patents therefor.

Case of Jerome B. Coates, Report of Commissioner of Land Office, 1876, p. 83.

An alien who has never declared his intention to become a citizen is not a qualified locator of mining ground, and he cannot hold a mining claim, either by actual possession or by location, against one who connects himself with the government title by compliance with the mining law. The alien's claim is void.

Golden Fleece Co. vs. *Cable, &c., Co.*, 12 Nev., 312.

A case exactly in point is *Boyce* vs. *Danz*, 29 Mich., 150:

"As already stated, complainant went upon the land in

February, 1857, but he had not then declared his intention to become a citizen, nor did he make that declaration until the 5th day of the next month. Before that day it was not competent for him to file a pre-emption claim or to claim any benefit under the act." * * * To the objection that "in his claim he stated that 'on the 20th day of February, 1857, he settled and improved' the land now in dispute, and is consequently estopped from dating the commencement of his settlement under the act at any later day," the court say: * * * "The settlement contemplated, as it seems to us, must be the settlement of a qualified person; and that of the complainant must consequently be deemed to have begun on the 5th of March, 1857."

No retroactive effect is given to a declaration of intentian to become a citizen.

Ettenheimer vs. *Heffernan*, 66 Barb., 376.

In *Heney* vs. *Brooklyn Benevolent Society*, 39 N. Y., 335, it is stated that the retroactive effect of naturalization in England is due to special provisions in acts of Parliament. The New York court held:

"* * * It would be most logical and most consistent with sound principle to say that the subject when naturalized began to have capacities pertaining to citizenship available for the future, and only in such future. If it were conceded that the Congress of the United States have power to declare the effect of naturalization so as to give to the subject thereof all the rights retroactively, as well as prospectively, which he would have had if native born, of which, in respect to real estate within the State, the transfer, transmission, and descent of which is peculiarly matter of State policy, there is great room for doubt. I think it clear that the naturalization laws of the United States admit of no such construction.

"Under those laws the applicant is admitted to citizenship upon complying with certain prescribed conditions. He becomes a citizen. He is put in a condition, or acquires a character, in which he can have and enjoy all the rights and privileges which, by law, pertain to citizenship, and that is all. But all this is, according to the plain reading of the laws, prospective. His capacity then begins to

be useful or efficient to enable him to have and enjoy whatever pertains to his new character."

Also see *White* vs. *White*, 2 Met., Ky., 189.

The case of *Osterman* vs. *Baldwin*, 6 Wall., 122, is not in point.

Under the laws of Texas an American citizen was an alien and could not hold real estate there. Baldwin bought of the Galveston City Company certain land. After the admission of Texas a party claiming adversely defended on the ground that Baldwin, being an alien at the time of the purchase, never took title. The Supreme Court of the United States applied the rule "that an alien may take by deed and hold against the sovereign until office found." The deed being from a citizen, is good against citizens, but not against the sovereign. Texas did not escheat the land prior to annexation. The legal title was in a citizen of Texas, and the equitable in Baldwin until annexation, which made Texans American citizens. It did not make Baldwin a citizen of Texas, but made his grantors American citizens. The right of escheat was not enforced by the Republic of Texas. The resolution of annexation reserved to the State of Texas its wild and unappropriated lands, but did not reserve any right of forfeiture against American citizens. The State of Texas had the right to escheat the lands of aliens to the United States, but not of citizens, as its power in this respect was no greater than that of other States. The court say in the opinion: "When Texas was admitted into the Union the alienage of Baldwin was determined." It would have been more correct had they said "the alienage of Texas was determined." Her right of forfeiture was determined because citizens of the United States had equal rights with Texans in Texas, and could enforce every right there which could be enforced by citizens of Texas. The sovereignty of Texas as a nation was

determined, and the prohibition to the acquirement of land by American citizens fell with it.

The citizenship of Baldwin was not changed, and the statement that naturalization has a retroactive effect was *obiter dicta*, and erroneous.

The joint resolution admitting Texas, and the 1st section of the Act of December 29, 1845, 9 Stat., 1, put Texas on the footing of other States, and extended all the laws of the United States over Texas. See *Catlin* vs. *Cocke*, 14 How., 235.

This court has passed upon the question of alienage in the case of *Hall* vs. *Russell*, 11 Otto, 510–511, where it was held that the grant was not to a "settler," but to a "qualified settler." "Whenever a settler qualified himself to become a grantee, he took the grant, and his right to a transfer of the legal title from the United States became vested. But until he was qualified to take there was no actual grant of the soil."

Donations were confined to citizens, and no alien could obtain a patent until naturalization; and the court held: "an alien who had declared his intention to become a citizen, or who should do so before December 1, 1850, was a qualified settler, but he was not a qualified grantee until he had completed his naturalization."

"His rights in the land were statutory only, and cannot be extended beyond the just interpretation of the language Congress has used to make known its will."

Ibid., p. 512.

As Mr. Starr had no legal possession of the land in controversy prior to July 3, 1878, and could have none, he could do no act in compliance with the law until after that date, and his papers then on file in the Leadville Land Office were false and fraudulent.

These decisions show that the register had no jurisdiction of the application of Starr, in March, 1878, for a patent,

and that the proceedings being in violation of law were absolutely void.

"What the law says shall not be done shall not vest a title or receive any aid when it is done."

Bank of the United States vs. *Norvell*, 2 A. K. Mar., 105.

"A transaction originally unlawful cannot be made any better by being ratified."

United States vs. *Grossmayer*, 9 Wall., 75.

In ejectment certficates of entry—and a patent based on fraud can be inquired into, and are not conclusive upon the court.

State of Minnesota vs. *Bachelder*, 1 Wall., 115.

V.

The evidence from the land office was properly admissible to show the nature of the location, when it was made, and the extent of surface claimed by single locators from 1868 to 1877, such evidence being pertinent to show that the officers had exceeded their powers in allowing the entry for more than twenty acres, and in granting a patent for 164.61 acres in violation of the Revised Statutes.

VI.

The court below construed the law of 1872, as requiring each claimant to survey, apply for, and prove up his location, as originally located and described, as a separate proceeding. This is the law as to lode claims, and the statute expressly requires proceedings for patents for placers to be the same as for lode claims.

No provision was made in the statute of 1866 for making relocations.

The act of 1870 subjected placer claimants to the same rules which governed lode claims, in regard to entry and patent. No provision was made for relocation of claims.

The statute of 1872 provides that, in case of forfeiture of claims by failing to do the annual labor required, the land shall be open to relocation, in the same manner as if no location had been made. No other form of relocation was provided for, and the rights of the relocator commenced with the date of his relocation of the abandoned lode.

The Statutes of Colorado permitted relocation, to correct errors, and extend boundaries to the limit allowed by law, if no adverse rights existed; and relocations in violation of the statute were void.

The record evidence was admissible to show that the patent and survey were not based on a single location of 164.61 acres, claimed and located under the mining laws of the California District and of the Territory of Colorado, but were based on location certificates made in violation of the Revised Statutes, exceeding 20 acres.

It also showed that, in that mining district prior to 1872, the placer claims were small in area, 300×500 feet, and in 1874, 20 acres to each person; and that Starr and his confederates, professing to act under the State law, made their relocations in excess of 20 acres each.

The statute allows joint entry of contiguous claims on surveyed lands owned by two or more persons, even if such claims are less than ten acres each. But in such case, each claimant must prove that he is a qualified locator, and has perfected his right to make an application. He must show that he has made the required improvements. Under the law of 1872, he must show that he has performed $100.00 worth of work each year, and that, at the time of entry, $500.00 of improvements have been put upon the land. To consolidate a claim which has not been improved to the

extent required by law with one which has been so improved, is in violation of law.

It is not shown that Starr's improvements were upon the location as claimed by Aug. R. Meyer in 1877, or that any improvements were made by Meyer or his grantors.

This consolidation is unauthorized for another reason:

Sec. 2332, R. S., provides: "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter in the absence of any adverse claim."

The statute of Colorado of Feb. 14, 1874, prescribing limitations for mining claims, required possession for five successive years thereafter to entitle the owners to be adjudged "the legal owners of said lands, tenements or mining claims, to the extent and according to the purport of his or her proper title or pre-emption." This required a possession of five years from the date of the location certificate, it made after Feb. 14, 1874.

The record shows no date when possession was taken of any portion of the land prior to the passage of the law of Feb. 14, 1874, except the Floyd placer claims. Schultz purchased from C. W. Floyd, Oct. 16, 1869, his interest in mining claims Nos. 2, 3, 4, 5 and 6 in California Gulch. April 7, 1877, he purchased of Thomas Graham one-third interest in the location of C. W. Floyd, Susan Floyd, and Thomas Graham, of Oct. 1, 1868. The one-third interest of Susan Floyd does not appear to have been conveyed. April 15, 1877, Schultz re-located, but not in compliance with the State law, the entire Floyd claims, 1,500 × 500 feet. May 19, 1877, he relocated the Floyd claims, as 1,000 × 500 feet, excluding the first five hundred feet next to corner No.

1 of the location of Oct. 1, 1868, and quit-claimed his interest in that first five hundred feet, to Aug. R. Meyer, on the 30th of May, 1877. Meyer held that claim by virtue of his re-location in April, 1877, and the bar of the statute runs from that date.

The next location in point of time was that of A. B. Wood et al., who located Sept. 21, 1874. The date of the Bradshaw locations is not given, but they were sold to Peter Starr May 21, 1875, and if re-located by Peter Starr the certificate is void on its face as it contains no starting point.

The remaining locations that appear of record were made in 1877. At the date of the entry the bar of the statute, so far as shown by the record, was valid only as to the re-location of Shultz of about eleven acres, made May 19, 1877, none of which was included in the land relocated by Meyer August 24, 1877. The attempt to consolidate with part of the Floyd claims the claims for 160 acres excepted from the benefit of Sec. 2332, R. S., was a fraud upon the Government. The statute of limitations had not, at the date of entry, run in favor of any part of the land deeded in 1877 by Meyer to Starr, and by Starr to plaintiff.

The Court will notice that in the deed of Meyer to Starr, August 27, 1877, the land is described as placer-ground; while in the deed from Starr to plaintiff, the land is described as a tract of land by course and distance, and not as mining or placer lands. At that date Starr had no title even as a possessory claim, which is held, in *Forbes* vs. *Gracey*, 4 Otto, 766, to be simply "the right to explore and work the mine under the existing laws and regulations on the subject." This right of exploration was not conveyed to plaintiff, because Starr did not have such a right. But the deeds, while conveying no legal right, were properly admissible to show that Meyer conveyed his relocation to

Starr, and that Starr abandoned the possession to the plaintiff in error, who had entered upon the land for the erection of smelting-works, in the spring of 1877, prior to Meyer's purchases. This proves that Starr had not the possessory title to the claim in March, 1878, when he filed his sworn application, and that the application was false and fraudulent. Plaintiff was not a *bona-fide* purchaser from Starr, and this case is not one where money has been paid without notice of the frauds and illegalities which procured a patent for this land as a placer-claim.

The mining statute expressly reserves the right of third parties to show that the mineral claimant has not complied with the law, even after publication and after entry; and when the facts constituting non-compliance with the law and falsehood and fraud are matters of record before the officers of the Government, and show that they have no power to act, the patent issued is void. This is the rule in regard to patents under the patent law.

It is based on the principle that executive officers of the government have no power to act except as prescribed by law. This is the rule laid down in *The Floyd Acceptances*, 7 Wall., 677.

Under this rule, this court has held that filing a declaratory statement in a pre-emption, before the return of the survey, was in violation of law, and as it was made and filed without authority of law, it "was in every sense an unofficial document not belonging to the office," and "was a nullity."

Lansdale vs. *Daniels*, 10 Otto, 116.

Under this rule the location notices filed by Starr, the application and affidavits for patent, made prior to July, 1878, were nullities, and could not give the Register jurisdiction to publish notice or post a plat and notice in his office.

The rule in such cases is "that every statute authority in derogation of the common law, and the result of which will be to divest the title of one and confer it upon another, must be strictly pursued or the title will not pass. The case is not one for presuming that public officers have done their duty, but for inquiring what they have in fact done, and it must be shown that it is in conformity with the statutory requirements."

Bunner vs. *Eastman*, 50 Barb., 648.
Weimer vs. *Bunbury*, 30 Mich., 219.

The facts which deprived the Register of authority to issue publication notice were a matter of record, though unofficial, and he could not give them validity by filing Starr's declaration of intention to become a citizen.

In summary proceedings the facts which give jurisdiction ought to appear on the face of the record; otherwise the proceedings are not merely voidable, but absolutely void.

Thatcher et al. vs. *Powell et al.*, 5 Wheat., 119.
Galpin vs. *Page*, 18 Wall., 366.

The case is analogous to the location of lands by military land warrants—the location of a warrant taking the land out of the list of locatable public lands. The mining law gives the qualified locator—a citizen, or one who has declared his intention to become a citizen—the right to the exclusive possession of the lands, and it is not thereafter subject to location if his location is legal and a matter of record. This renders the location as first made not subject to relocation by another claimant, and the right to possession is absolute until forfeited by non-performance of labor. It follows that, unless the statutes of the United States authorize relocations and enlargement of the boundaries, the locator in making entry for patent must make entry on each separate location. His location certificate upon which his survey is made must be a valid one. If not, the survey falls, and the entry and patent with it.

This is in accordance with the rule in *Wirth* vs. *Branson*, 8 Otto, 121, where it was held that while a valid location was in force "no other could lawfully be made on the land. A subsequent location, though followed by a patent, would be void."

Courts have in suits at law the authority to decide whether the officer had jurisdiction. Under the mining laws, special jurisdiction is given the Register to publish mining application notices for sixty days; and adverse claimants can within that time file their adverse claims, and have the case certified to the proper court for a hearing. There must be a valid notice to bring the parties before the Register. He has no jurisdiction of the subject matter, or the person, until a qualified locator has filed the papers necessary for jurisdiction. Papers filed by an alien do not give the Register jurisdiction, nor give adverse claimants a day in court.

The case is parallel to that stated in *The Grafton Bank* vs. *Bickford et al.*, 14 Gray, 564, where the acting judge had no jurisdiction and all his acts were void. This was re-affirmed in *Denny* vs. *Mattoon*, 1 Allen, 367.

Also, see *Baldwin* vs. *Hale*, 1 Wall., 237;
Whitney vs. *Blanchard*, 2 Gray, 209.

Judgments of a court made without authority, "are regarded as nullities. They are not voidable, but simply void.

Elliott vs. *Piersoll*, 1 Pet., 340;
Piersoll vs. *Elliott*, 6 Pet., 97;
Sherman vs. *Buick*, 3 Otto, 216.

VII.

Counsel for plaintiff, in the brief filed at this term, do not rely upon the face of the patent as sufficient to show that plaintiff has a perfect title at law, but argue that the patent is to be assumed to be for 160 acres alone, because

it states that it is for 164.61 acres, "more or less." That the law points out no mode for computation, "but, on the contrary, it will presume that the area is less than 160 acres; *if otherwise, the land department had no authority to issue it.* It will presume that the land officers did their duty, and that they made the calculation and found that there were not exceeding 160 acres; *if otherwise, it would be illegal to issue the patent in the manner it was issued.*"

The patent refers to the plat and field-notes of survey of the entry upon which the patent is founded, and the field-notes are made by a sworn deputy surveyor, and are approved by the surveyor general. These field-notes show that the survey included exactly 165 acres within its limits, and that .39 acres was excluded in the computation as belonging to survey 158. (p. 65, Printed Record.)

The Receiver's Certificate (p. 76), the Register's Final Certificate of Entry (p. 71), and Starr's affidavit on the same page, fix the area at 164.61 acres. There is no room for presumption. The calculation has been made by the claimant as well as by proper officers, and the patent, according to the admission of plaintiff's counsel on p. 9 of briel, was issued without authority of law, and is illegal on its face.

Again, counsel for plaintiff claim that the rule in section 2274, R. S., applies to this case, and authorizes consolidation of claims. That section applies only to homestead and pre-emption claimants who have, prior to survey made improvements upon the same legal sub-division, and allows them to make joint entry of 160 acres, or one settler may convey to his co-settler his interest, prior to entry, so that entry may be made by one for both parties in interest.

The case of *Polk's Lessee* vs. *Wendel*, 9 Cranch, 96, is based on a statute which provides that where two or more persons "agree to have their entries surveyed jointly in one

or more surveys, the surveyor is empowered and required to survey the same accordingly in one entire survey." This court held "that as the law stood previous to its passage, a joint survey of two entries belonging to the same person, or different persons, could not be made."

The mining laws make no provision for a joint survey. The survey is to follow the location. Under Sec. 2,324 R. S., the location is to be distinctly marked, and the record of location must describe the claim so as to identify it. The provision in regard to annual labor upon "claims held in common" refers in terms to locations prior to May 10, 1872, where persons held claims as tenants in common, having made one location-certificate in common of 200 feet each on the lode, but not exceeding 3,000 feet in length. Sec. 2,325, in referring to "a plat and field-notes of the claim or claims in common," refers to locations under the act of 1866, for which proceedings for patent were not pending in the General Land Office.

The claim that the patent is conclusive and cannot be impeached, and that every presumption is to be made in its favor as to its recitals, is not correct. In the ejectment case of *Stevens* vs. *Williams*, 19 Am. Law Register, p. 296, it was held by MILLER, J., that a patent for a lode, or vein, is not conclusive on the question whether the claim did contain a vein. Here the patent for a placer claim of 164 61-100 acres is not conclusive upon the question whether the land was at the time of entry valuable for placer mining. The evidence for the defendant and for the plaintiff, establish the fact that the entire relocation of Meyer was purchased in June, 1877, for business purposes and speculative purposes, was taken possession of at that time by plaintiff, and deeded to plaintiff in August, 1877. This was an absolute abandonment of the ground for placer purposes.

According to the same rule the patent is not conclusive as to the fact that Starr was a qualified locator in March,

1878, nor as to the fact that the statute of limitations had run in his favor.

Recapitulation.

1. The court did not err in admitting the evidence from the General Land Office. It was competent to show whether Starr was a qualified locator; the extent of his location; the consolidation of claims; the character of the ground; the date of the locations; the want of power of the Register to receive his application, to publish notice, and to allow an entry on a void application and publication notice.

2. The court did not err in its construction of the mining laws, that the survey must follow a valid location, and no joint survey for two or more locations can be made; that as the patent must follow a valid survey, and cannot exceed it, a patent based on a void location and survey is void on its face.

3. That in an action at law the want of power on the part of the officers of the Land Department in the proceedings for patent may be shown, and when shown, constitute a defense against the patent.

4. That the Revised Statutes governed the extent of the location and limited each claimant to twenty acres, and a patent issued for more than 160 acres (the limit of the location,) for any number of persons, is void on its face.

R. G. INGERSOLL,

Att'y for Sarah Ray, Defendant in Error.

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R. G. INGERSOLL,

Att'y for Sarah Ray, Defendant in Error.

FILED
MAR 18 1881
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

THE ST. LOUIS SMELTING AND REFINING COMPANY, PLAINTIFF IN ERROR,
vs.
THOMAS KEMP *et al.*
No. 736.

And,

THE ST. LOUIS SMELTING AND REFINING COMPANY, PLAINTIFF IN ERROR,
vs.
SARAH RAY *et al.*
No. 737.

In Error to the Circuit Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT OF T. M. PATTERSON,
FOR DEFENDANTS IN ERROR.

Statement.

This is an action of ejectment commenced by the plaintiff in error in the State Court of Colorado, and transferred therefrom to the Circuit Court for the District of Colorado on petition of plaintiff.

The complaint is in the simplest form. It alleges the incorporation of the plaintiff, &c.; "that it is the owner in fee of" the premises—two town lots—describing them; "that the defendants wrongfully withhold said premises from the plaintiff, to its damage in the sum of one thousand dollars." Prayer for the recovery of possession and damages.

The answer denies specifically every allegation of the complaint except that of the incorporation of plaintiff.

Upon the trial plaintiff, to show right of possession and own-

ership, offered in evidence the patent in controversy. To its introduction defendant objected, upon the ground that it was void on it face, it being for an amount of placer ground in excess of that authorized by law to be contained in one patent for a single placer-mining claim.

The Court, as appears by the record, overruled the objection and admitted the patent in evidence. The plaintiff then introduced a deed from the patentee Thomas Starr to A. R. Meyer, and one from Meyer to plaintiff, and then proved that the lots in dispute constituted a portion of the land described in the patent, and in the two deeds mentioned.

The defendants for their defence offered in evidence a copy of the application of Thomas Starr for patent to the so-called placer mining claim, and of the proof on which the entry for said claim was made in the U. S. Land Office at Fairplay, Colorado, certified under the hand of the Commissioner of the General Land Office and the seal of the said Land Office, to be a true and literal exemplification from the original papers on file in that office. [Record, folio 107, 108.]

To the introduction of this record plaintiff objected, for the reason "that it was not legal to go behind, or to introduce any evidence *aliunde* the patent to show its validity or invalidity; because the patent is conclusive evidence in this action of the regularity of all the proceedings which took place in the land office before its issuance, and because no evidence can be introduced to show the legality or illegality of the possessory or pre-emption title to the tract of placer land included in the placer patent, after the patent has issued." The Court overruled the objection and admitted the record. [Record, pp. 100, 101.]

The defendant thereafter proceeded to introduce evidence in support of his plea or defence of *ultra vires*, and in the midst of it the following occurred: [See Record, p. 113.]

"Here the defendant called Charles L. Hall to further testify for defendant in support of his affirmative defense of *ultra vires*, but the Court after he was sworn refused to have him testify and refused to permit other witnesses to testify to the same matters for the reason as given by the Court *that it was unnecessary*, as it would instruct the jury upon the question of the validity of the patent, and that the case would turn upon that question alone, and for that reason it was unnecessary to consume further time in making out the said affirmative defense."

Since defendent is willing to submit the case upon the ruling of the Circuit Court upon the question of the patent, no further details of the record will be here given.

Argument for Defendant in Error.

The attention of the Court is called particularly, to the extract from the record last above quoted. It shows, that while the Court went through the *form* of admitting the patent as evidence to the jury, and also of admitting the said record as evidence, yet practically and in effect the Court simply received the said record to inform itself of certain alleged facts, that from the facts it might be enabled to say whether or not the patent had been issued by authority of law, or in violation and in disregard of the law.

The facts asserted by the defendant were, that though the patent purported to be for a single placer claim, yet it in reality embraced fifteen separate and distinct claims, and that at least twelve or thirteen of these claims had been located subsequent to 1872—that is, in the spring and summer of 1877. Defendant further asserted that at least 10 of these claims had been conveyed to Starr, not as a purchase or for a consideration, but solely that Starr might embrace them in the entry he was about to make for patent, and after patent to reconvey them to his grantors; and that not one of these several locators and grantors could have obtained a patent for his separate claim, and that they took this method to do indirectly what they could not do directly,

The record clearly proved the above alleged facts, but the Court only examined it for two particular purposes; that was: to determine—

1. Whether or not the patent was in reality for more than one placer mining claim; and

2. If it was, when were the claims constituting the tract embraced in the patent located.

The Court found that the patented tract embraced 15 separate and distinct locations or claims, and that 12 or 13 of these claims were located subsequent to 1872; and having satisfied itself of the above facts, the Court upon them held as a matter of law,

that the patent had been issued without authority of law and in violation of law, and was therefore void.

It will be observed that the instructions of the Court to the jury leave nothing for the jury to decide. They state what the facts are about the patent; that those facts establish the invalidity of the patent as a matter of law, and that their verdict must be for the defendants on account of the invalidity of the patent.

Plaintiffs have devoted much space to show (1) that the Court held the patent *prima facie* valid and admitted it to go to the jury; (2) that the Court admitted evidence *de hors* the patent to go to the jury, that the *jury* might pass upon the facts and from them decide concerning the patent; and counsel cite a long list of authorities to prove that it is not permitted to do this in an action at law. Defendants assert as a fact, taking the entire record, that this was not done; that the Court in its action, as we shall presently show, was in line with all of the authorities, and if there was the slighest divergence it was merely in detail, and not in an atom of substance.

To further establish what we have said concerning the action of the Court in the matter of evidence, we here quote its concluding sentence in its instructions: "It is to be said that the officers of the land department *had no authority in law to proceed in this way*, therefore the patent upon which the plaintiff relies is void, and their title fails."

It is claimed by plaintiff in error that the defendants are not in privity with the paramount source of title, and that they rely exclusively on the alleged invalidity of the Starr patent. We repectfully differ with plaintiff's counsel and say, that the record does not establish or leave room to infer any such facts. On the contrary, the record shows that the Court having informed itself of the facts disclosed in the land office record, stopped defendant in the act of producing testimony to the jury and refused to let them proceed with their testimony. The presumption must be that the Court was properly informed of the legal right of the defendants to call in question the validity of the patent and to receive the benefits to be derived from a decision adverse to its validity. As a fact, defendants' occupancy of the lots in dispute is and was of such a nature as to give to them the right to call in question the validity of the patent. They could not

very well plead the nature of their claim and title—the averments of the complaint, short and technical as they are, neither call for nor permit that; nor is there anything in the complaint to indicate that the plaintiff would rely upon a Government patent as the foundation of its title.

Neither did plaintiff, when this record was brought to the attention of the Court and offered as evidence, object to it on the ground that the defendants had not brought themselves within that relation to the Government in the matter of their possession and title, which would permit them to contest the validity of the patent. At no time during the trial was any question of that kind raised by plaintiff, and the fair presumption is, that the plaintiff also had been satisfied upon that point. In any event, we take it to be a well settled rule of law, that where evidence is offered only the objections urged against it will be considered, and if the objections urged are not sound, and the evidence is otherwise proper, no error is committed in receiving it.

Plaintiff's counsel cite a very long list of authorities to the effect that "a patent regular upon its face raises the presumption that all the previous requirements of the law have been complied with." This proposition defendants do not controvert; on the contrary, we join with them and say that it is the law.

The Court held that the patent was void. If it was void upon its face, or if the record offered in evidence and examined by the Court established that the patent was issued without authority of law or in violation of law, then the judgment should be affirmed. It can make no difference by what method of reasoning the conclusion as to the invalidity of the patent was reached. If the conclusion was right then the judgment was right; and the correctness of the conclusion is the only matter to be established.

Defendants maintain—

1. The patent is void upon its face. If not,

2. The record of the land office proves it to be void.

3. Its invalidity arises from the fact that it was issued without authority of law and in violation of law; and

4. The want of authority and violation of law arises from the fact that a placer patent is not authorized to be issued for a greater amount of placer land than 160 acres.

5. The Court committed no error in receiving the record in dispute as evidence to inform itself upon what locations and upon how many the patent was based.

As the foundation of their position, defendants maintain that, under the statutes governing, a patent cannot now and never could issue for more than one placer mining claim or claims that have been located and held in common. We further maintain that the "claim" or "claims in common" for which a patent may issue is the "claim" recognized, *first*, under the local rules and customs of miners adopted and enforced before the enactment of statutes upon the subject; and, *second*, the "claim" which may now be located or taken up under the statutes by an individual, association, or corporation, and that a "claim" or "claims in common," within the meaning of the statute, is not the monstrous thing invented by the Land Department, and which has neither reason, precedent, nor statute as its authority.

The difference between the two sort of "claims" may be stated briefly: The first is the amount of placer ground which may be located by a single person or association; the latter, it is claimed by the Land Department, may be a combination or consolidation of claims, without limit as to their number or the number of acres contained in the aggregate. These, the Department contends, may be surveyed as one plat, treated in every way as one claim, and a patent be issued for that claim. It may be a thousand claims combined into one, and embrace a half million of acres.

The more accurate description of a mining claim, as applied to either lodes or placers, is the extent in length upon a lode with the surface ground on either side, or the quantity of placer ground which a qualified person, association, or corporation may locate, whether under the statutes or the local rules and customs of the mining district.

It is the perversion of the word "claim," as used in the statutes, by the Land Department, that has led to the practice of which the patent in controversy is a result. The Department, in construing the word "claim," has cut itself loose from the meaning universally given to it by miners before the adoption of the statutes and as the word is now used and understood in every mining camp upon the continent.

Long before any act of Congress upon the subject the vernacular of the mining camps was established. In it the word "claim" had a fixed and definite meaning. Their local rules or customs informed every one how they might locate or take up a "claim," what they should do to maintain their right to the "claim," how the "claim" became forfeited, the size of a "claim," and what constituted the abandonment of a "claim;" and Courts of the mining States and of the United States, in adjudicating mining controversies, speak of the "claim" in the same sense as that in which it has always been used in the mining districts. We challenge plaintiffs' counsel to show that the word "claim," used as a substantive and applied to mineral lands, has ever been used in the sense other than as contended for by defendant—that is, the quantity of such land, lode, or placer which a qualified person, association, or corporation may locate and possess under the statutes or the local rules and customs of miners.

Congress, in legislating concerning the mineral land, adopted the word and used it only in the sense defendant contends for. An examination of the several sections of the Revised Statutes concerning mineral lands, will convince the Court of the truth of our position.

Section 2320 provides how "mining claims" upon veins, &c., shall be governed as to length. That a "mining claim," located after a certain date, shall not exceed a certain number of feet, but that no location of "a mining claim" shall be made until the discovery of the vein. That no "claim" shall extend more than a certain number of feet on each side of the vein—nor shall any "claim" be limited to less than a prescribed amount, and that the end lines of each "claim" shall be parallel, &c.

Sec. 2322 provides that "the locators of all mining locations," &c., shall have the right of possession, and to follow the vein on its dip outside of their own location and into the land adjoining; but that nothing in the section shall authorize the possessor or locator of a vein, which extends in its downward course beyond the vertical lines of his "claim," to enter upon the surface of "a claim" possessed by another. In this section, "location" and "claim" are used synonomously, and indeed the words are so used throughout the Statutes and fix the meaning of "claim" beyond a peradventure.

Section 2324 provides for the location of "claims," the performance of annual work thereon, and forfeiture for failure to perform the work. In this section the word "claim" appears no less than eleven times, and each time in the sense contended for.

In sections 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, the same constant use of the word appears, and always meaning the same thing.

The word "claim" then, as used in the Statutes, is a technical word; it has a fixed and well defined meaning. It is a well settled rule of construction that where technical words are used in a statute they must be taken in a technical sense.

Sedg. Stat. and Const. Law, p. 221.

No better illustration of the position of the Land Department and the counsel for plaintiff upon this question can be given than the following letter from the Department. It is terse and clear, leaving no room for uncertainty.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, September 20, 1879.

Messrs Smith Bros, Puls Marsh, Nevada.

GENTLEMEN: In reply to your letter of the 16th ult., you are informed that *the area which may be applied for as a placer "claim" is unlimited*, provided the separate locations constituting it were of legal quantity properly made, are all contiguous, making one tract, and the entire title is in applicant for patent. Claims which include all forms of deposit, except veins of quartz or other rock in place are treated as placers. Five hundred dollars expenditures are required on each *claim*, and not on each *location*, when applying for patent to land situated as aforesaid. * * *

Very Respectfully.

J. M. ARMSTRONG, *Acting Commissioner.*

But the Land Department also holds that a patent for a *lode* claim can issue for no more than *one* location—that is, for the length along a lode with the quantity of surface ground upon either side of it which a qualified person, association, or corporation may locate under the statutes and local rules and customs; but this cannot exceed 1,500 feet along the lode and 300 feet on either side of it. The Land Department rigidly enforces this rule as to lode claims. Why does it hold a different rule or interpretation of the statute as to placer claims? The Department

is emphatically right in its construction of the law as applicable to lode claims.

The power to issue patents for placer claims is conferred in one section of the Revised Statutes; the circumstances, conditions, and proceedings under which they may be issued are fully and specifically set forth in another.

Revised Statutes, sec. 2329.

Ibid., sec. 2325.

Section 2329 reads as follows:

"*Claims* usually called 'placers,' including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent *under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims.*"

There is but a single modification of this very explicit provision. It is found in the same section, and is, that where the placer lands have been previously surveyed by the United States the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

Without stopping to comment upon the significance of the fact that authority is here given for the entry and patent of "claims" called placers, we call the attention of the Court to the "circumstances," "conditions," and "proceedings" under and upon which patents may issue for vein or lode claims. They are all found in section 2325. We quote the section entire, taking the liberty to italicize such words as we deem important:

"Any person, association, or corporation authorized to locate a *claim* under this chapter, having claimed and located a piece of land *for such purpose*, who has or have complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of *the claim* or *claims in common* made by or under the direction of the United States Surveyor-General, showing accurately the boundaries of the *claim* or *claims*, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent; and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office in the manner following: The register

of the land office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days in a newspaper, to be by him designated as published nearest to such *claim;* and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter within the sixty days of publication, shall file with the register a certificate of the United States Surveyor-General that five hundred dollars worth of labor has been expended or improvements made upon *the claim*, and furnish an accurate description to be incorporated in the patent. At the expiration of the sixty days of publication, the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place *on the claim* during such period of publication. If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Were it not that "claim" is once used in the plural, and the phrase "claims in common" also appears in the above section there could be no room to question that Congress provided thereon for the incorporation in a patent of but a single "claim," and in the sense in which the term is used in the other sections of the Statutes.

Plaintiff contends that this section in so far as provides that the applicant for a patent shall file a plat and field-notes of the claim or *claims in common* in the proper land office, contemplates that an applicant may have included in his survey and plat and entry and patent any number of claims, whether located by himself or acquired by him through purchase or otherwise. This defendants emphatically deny. The language is not open to such construction. On the contrary, it means something entirely different, as an examination of the Statutes will readily disclose.

In the first place, the language is peculiar: "A plat and field notes of the claim or *claims in common.* " If twenty different persons, each one for himself, have located twenty different claims, in no sense can they be said to own or possess these twenty claims

in common. The right of each to his claim is exclusive. There is no community of interest in the several claims. If nineteen of these owners should convey to the twentieth, the grantee could not be said to own these claims in common. To hold or own anything in common requires the proprietorship or possession by at least two persons. If Congress meant either one or the other of these conditions, it would have used the language necessary to express it. To say that it did, is to convict the legislative body of the nation of the most violent abuse of the English language; of using words in a statute having a technical and well known meaning, to express something which they cannot mean under any definition of them to be found in a legal or other dictionary. Yet Congress in their use meant something, and we think we can show precisely what that was.

The first legislation by Congress, providing for the disposition of mineral lands, was in the act of July 26th, 1866. This act related solely to lode claims. It provided:

> That no location hereafter made shall exceed two hundred feet in length along the vein, for each location with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth with all its dips, variations and angles, together with a reasonable quantity of service for the convenient working of the same as fixed by local rules; *and provided further,* That no person may make more than one location on the same lode, *and not more than three thousand feet shall be taken in any one claim by an association of persons.*

Under this section an individual might locate a claim 200 feet in length and no more along a lode, but an association might take up to the extent of 3,000 feet, at the rate of 200 foot claims to each individual of the Association. The discoverer of the lode may locate two of these 200 foot claims, one of them being in the nature of a reward for his skill and industry, and if he has associated with him thirteen others, they may all locate to the amount of 3,000 feet upon the lode, but no one of the association can take up more than 200 feet. Claims located under this provision were held in common. They became claims in common.

Although section 4 of the act of 1866 was repealed in 1872, yet many claims were located under it while it was in force, and Congress, to remove any doubt that might exist as to the right

of owners of such locations to obtain patent under the provisions of the section, for their claims, practically one claim, but yet in fact "claims in common," inserted the phrase "claims in common" in the section.

That "claims in common" refer to the 3,000 feet locations made under the act of 1866, is more clearly apparent from the rendering of the preceding section (2324) of the Revised Statutes. It provides among other things for annual work to be done upon lode claims.

On each claim located *after* the 10th day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvement made during each year. On all claims located *prior* to the 10th day of May, 1872, ten dollars worth of labor shall be performed or improvements made by the 10th day of June, 1874, and each year thereafter, for each one hundred feet along the vein, until a patent has been issued therefor, *but where such claims are held in common* such expenditure may be made on any one claim.

The reason for these two provisions as to annual labor is, that after the act of 1872, two or more lode claims could not be located in common, and as each of such claims was fixed at fifteen hundred feet, $100 worth of labor or improvements was required for each claim annually. But under the law of 1866, individual claims could not exceed 200 feet; it would be manifestly unjust to require as much annual labor upon a 200 foot claim as upon a 1,500 foot claim, so the amount of $10.00 per 100 feet was required. But again: under the same law an association of persons might locate a number of these 200 foot claims in common, but in all not to exceed 3,000 feet. While they were claims in common, they constituted practically one claim, and it would be manifestly a hardship to require $20.00 worth of labor to be done annually upon each 200 feet, while the association owning them might be concentrating their energies upon a single shaft upon the claims; so Congress properly provided, that "where such claims are held in common such expenditure may be made on any one claim."

In 1872, Hon. Willis Drummond, Commissioner of the Land Office, and Hon. W. H. Smith, as Acting Secretary of the Interior, construed the annual labor clauses of Sec. 2324. In the let-

ter referred to, in speaking of locations under the Act of 1866, they say:

"In making these locations the miners had the option of taking up and recording their claims, either as segregated individual locations of 200 feet each and working and disposing of them as such, or they could associate together and locate *a number of these claims in common*, provided the legal maximum of 3000 feet was not canceled."

They then decide, that the clause providing that where claims are held in common the entire work may be done on any one claim, referred to locations made in common under the act of 1866.

Since 1872 under legislation concerning placer lands, miners have the option of taking up and recording placer claims either as segregated individual locations of twenty acres each, or, they may associate together and locate a number of these twenty acre claims, in common, provided the legal maximum of 160 acres is not exceeded.

Then, these are the "claims in common" referred to in section 2324, for no other are made possible under the mining statutes.

For what, then, may a patent issue under section 2324? Clearly but for a "claim" or "claims in common." The former, since 1872, can consist of no more than 20 acres, the latter can consist of no more than 160 acres.

Congress attempted to surround the disposition of its mineral lands with extraordinary safeguards. It was evidently its intention to part with them in diminutive tracts, in order that the greatest possible number of citizens might become workers and owners of them, and their monopoly by mere speculators and grabbers be thwarted. To accomplish this, the patenting of the "claim" was made controlling. Congress knew that before that body had fixed the limit of a claim by legislation, miners by their local rules and customs had been equally chary as to the quantity permitted in a claim. Then, again, Congress required the greatest publicity to be given of the application for a patent before it could issue. First, the location of the claim had to be made, next the application for a patent must be filed and accompanying this must be a plat and field notes of the claim, and the claim must be distinctly marked by monuments on the ground.

Then a copy of this plat and application must be posted on the land embraced in the plat, and affidavits of two persons must be filed showing the posting of the application and plat. Then there must be a publication of the application for sixty days in a newspaper, and the register must also post this notice in his office for sixty days. Then the certificate of the Surveyor General must be filed showing that at least $500 worth of labor has been performed on the claim, and after other certificates and affiavits have been filed, if there is no adverse claim, a patent may issue.

Is all of this required as to a "claim" or "claims in common," limited and diminutive in size, or as to ten thousand separate locations or claims concentrated into one, and comprising it may be a county in area?

Only upon this latter theory could the Starr patent have been issued. Such a construction of the statute places it in the power of any individual, corporation, or association to monopolize great quantities of valuable placer ground; it violates every principle, rule, and theory observed by Congress in disposing of the public lands, whether agricultural, timber, or mineral; it revolutionizes the practices, rules, and customs of mining districts, which, as Senator Stewart so ably and truthfully said, "were democratic in their character, guarding against every form of monopoly, requiring continued work and occupation in good faith to constitute a valid possession;" and it makes easy the grossest frauds and pays a premium to rascality.

Starr's application and accompanying papers, under the seal of the land office, (commencing on page 54 of record,) serves to illustrate the absurdity and glaring evils involved in such a construction. They show that the $164\frac{81}{100}$ acres conveyed by the patent originally consisted of seventeen separate mining claims or locations; that the first was located by Thomas Starr in 1868, and between that time and 1870 he constructed a ditch and entered into its possession; that another claim of a few acres was located in 1874, but whether work was ever done upon it does not appear. All of the remaining thirteen claims were located in 1877. Carbonates were discovered near where Leadville now is in the Spring of 1877. A few speculators at once saw that, as is the case with all new important mining discoveries, a stam-

pede would inevitably set in towards it and a considerable city be brought into existence. Ground fit for a town or city is not plenty in the heart of the Rocky Mountains—the side of a mountain or a narrow valley between mountains mark the possibilities in that direction, and the one who secures it usually secures a fortune. These speculators readily saw where the prospective city must necessarily be located, and they at once set about securing the site. Within a short time the necessary new locations were made, the several tracts were surveyed, location certificates made out and filed, and the work was practically completed. Nothing remained but to obtain a patent. If each locator sought patent for his separate claim it would be very expensive. Applications, surveys, plats, the posting of notices, marking of the boundaries, publication, affidavits, and five hundred dollars' worth of labor expended on each claim must all be performed; and these expenses, delay, and trouble they did not propose to incur. So the locators of each of these thirteen claims at once convey to Starr, and Starr gives them back a bond that he will reconvey to them when he obtains the patent. These conveyances were made solely that the owners of the locations might obtain a patent title to them without expending a cent for labor or performing the other acts made necessary to a patent by the statutes. Not one of them could have obtained a patent for his claim, though each was willing to apply and conform to the statutes as to notices, publication, &c., for the reason that he had not expended $500 in labor upon his claim, which is a definite prerequisite to a patent.

With the title to these claims in Starr, the process of obtaining a patent for all was cheap and easy. He has a single survey made, including them all in one plat; he makes a single application, files a single plat, posts a single notice, makes a single publication, obtains the certificate of the Surveyor-General that $500 worth of labor has been expended upon "the claim,"—meaning upon any one of the entire fifteen claims—and the patent issues. He then reconveys to the original locators and they each have their title from the Government with no expense or trouble save the nominal sum per acre charged by the Government and their *pro rata* of the expenses incurred by Starr. In this process they have defrauded the Government and delib-

erately and openly evaded the Statutes; and the strange and regretful part of the transaction is, the Land Department unthoughtedly pointed out the way to this fraud and evasion and has become *particeps* in the attempt to expel more than five hundred men, women, and children from the homes obtained by them in good faith upon what they believed to be public lands, expecting that the proper municipal authorities would in due time secure their title for them, and upon the faith of which belief they have expended in substantial improvements upon the land more than a quarter of a million of dollars.

The agent of the plaintiff was a party to this transaction. The record shows that he located the ground in controversy in 1877; he immediately conveyed to Starr; Starr delivered back his bond to reconvey; Starr obtained the patent; he reconveyed to Meyer; Meyer conveyed to his principal, the plaintiff-in-error, and now the company says to the defendant, I have a patent title for your promises, and you must surrender possession of them with all your improvements to me.

Under the construction given to the Statute by the land office, and which must prevail if the Starr patent is maintained, a single individual may now locate and obtain title to a thousand acres or more of placer lands, though there are no other locations than his own, and but five hundred dollars be expended thereon in labor. There is no limitation as to the number of "claims" which any one person or association may locate, whether they be lode or placer. An individual may locate one or a thousand claims; they may all be contiguous. The safeguard consists in requiring annual labor upon each claim, and a strict compliance with the statutory conditions and proceedings named in the Statute before entry can be made and patent issued. Not the least of these safeguards is the necessity of doing $500 worth of labor upon a claim before patent can be obtained. But if the Land Department is right, I, or any other person, may locate a hundred contiguous claims this month, perform $500 worth of labor upon one of them by the next month, then have all of the claims surveyed as one tract, call them one claim, make one application, post one notice, make one publication, file the necessary affidavits, procure the certificate of the Surveyor-General that five hundred dollars worth of labor

or improvements *have been made on the claim* and his patent issues. The Land Department cannot be heard to say that it would refuse a patent under such circumstances. To do so, if the locations have been properly made, would be an arbitrary and illegal exercise of power and the usurpation of authority. If the locations were properly made, then title to each of them would be as fully in the locator and applicant for a patent as though others had located them, and he held them by conveyance and purchase.

Numerous illustrations by actual transactions could be given to show how easily, under the construction contended for by the Department and plaintiff, the objects and purposes of Congress in its disposition of mineral lands are frustrated. The methods of doing this are only limited by man's ingenuity and the depths of depravity to which professional land grabbers will descend. The Department (not intentionally or with evil mind, but necessarily on account of its construction of the law,) invites these schemes, and places it beyond its power to arrest them.

By what is said we have sought to show that Congress has only authorized its officers to issue a patent for a mining "claim," that this claim consists "of the quantity of lode or placer land which an individual, association or corporation may or does locate under the law as a "claim," and that it is not permitted to issue a patent for a number of "claims" separately located, combining them into a single claim by survey and plat for the purpose of entry and patent.

That the patent is void follows as a corollary. We maintain that it is void upon its face, notwithstanding the Court below seemed to hold otherwise.

IS THE PATENT VOID UPON ITS FACE?

It is conceded that if a patent issues without authority of law it is void.

It is well settled that if a patent issues for a greater number of acres than the law permits, it is issued without authority of law and therefore void.

Patterson vs. Winn, 11 Wheaton, 632.
Polk's Lessee vs. Wendall, 9 Cranch, 87.
Jackson vs. Lawton, 10 Johns, 23.

In Polk's Lessee the defendant offered in evidence a patent for 25,060 acres. To the reading of this patent plaintiff objected, because by the laws of North Carolina no grant (patent) could lawfully issue for so large a number of acres as are included in that grant. Said the Court: "If this objection be well founded, it will be conclusive."

In Patterson vs. Winn, *supra*, a patent for 7,300 acres was offered in evidence. Defendant's counsel objected to it going to the jury, affirming the same "to be void in law, inasmuch as no grant could issue under the laws of the state for so great a number of acres as are comprised in the said grant." Said the Court: "The objection in this case to the admissibility of the grant in evidence is, that it was issued without the authority of law, and in violation of certain statutes of the State of Georgia, which it is alleged prohibit the issuing of a grant to any one person for more than one thousand acres of land; and if the statutes referred to will warrant this construction the objection was well taken, and can be sustained in a court of law."

These two decisions have been referred to and approved by this Honorable Court in every case subsequent, in which the validity of grants or patents have been discussed.

If then the statutes warrant the construction that a patent for placer lands cannot be issued for more than 160 acres to an individual or association, the patent in dispute was issued without authority of law and is void. We have seen that the statute provides for the patenting of a single claim only, or "claims in common;" and that the claims in common referred to are those lode claims located under the law of 1866, and the placer claims that may be located under the law of 1872, by which 160 acres and no more, may be located by an association of persons, but not more than 20 acres to each individual.

The statutes clearly define the maximum that may be taken of placer lands in any one claim.

The first legislation by Congress upon mineral lands was in 1866. This act related solely to lode claims, and provided the conditions and circumstances under which, and the proceedings by which, a patent for a lode claim might be obtained.

14 U. S. Stats. at Large, 251.

Not until 1870 did Congress authorize any disposition of the

placer lands. Until that time they were reserved from sale and patent. In the law of that year it was enacted:

SEC. 12. That claims usually called placers, including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent under this act, under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims. * * * *And provided further*, That no location of a placer claim *shall exceed one hundred and sixty acres for any one person or association of persons.*

16 U. S. Statutes at Large, 217.

In 1872 Congress again legislated upon the subject. In section 10 of the act of that year it provided:

And all placer mining claims hereafter located shall conform, as near as practicable, with the United States system of public land surveys and the rectangular subdivisions of such surveys, and no such location *shall include more than twenty acres for each individual claimant.*

These two clauses limiting the size of claims located since 1870 and 1872 are found in sections 2330 and 2331 of the Revised Statutes, and are construed by the Land Department to mean, and no doubt correctly, that since 1872 each individual is limited to a placer claim of no more than twenty acres, and an association of eight or a less number of persons to as many twenty-acre claims as there are persons in the association; but the maximum must not exceed 160 acres.

The foregoing constitutes all the congressional legislation now or ever existing as to the size of placer claims. So it must be beyond dispute that if authority is given to issue a patent for a placer "claim" only, or its equivalent, "claims in common," located under the statute, the patent must be void.

But plaintiff asserts that prior to the law of 1870 local rules and regulations permitted a party legally to "hold by location *and purchase* any number of acres of placer mining ground." (Brief of Mr. Symes, p. 9.) This may be true to a certain extent. An individual could probably hold his "claim" limited in area by the local rules and customs and such other "claims" as he became the owner of by purchase. But that fact in no way assists the plaintiff, for whether located prior or subsequent to 1870, they were located as "claims," and each location was a

"claim," within the meaning of the acts of Congress. The law authorizing the sale and patent of placer lands authorized the patenting of a "claim" only, whether the same was located prior or subsequent to congressional action.

Plaintiff has not the temerity to contend that under the local rules and customs of any mining district a placer claim ever could contain as much as 160 acres. His own experience in the mining States and Territories forbade him to assert what would be a palpable untruth. Personal experience and the testimony of all authority upon the subject show to the contrary.

If it could avail the plaintiff to show in this connection that a patent might issue for a number of placer claims located prior to 1870 and consolidated by a survey into one tract, he cannot be heard to assert it now. He relied upon a patent as his ground of title, and he is precluded by the recitals of the instrument. The patent expressly states that it is for the placer mining "claim" of Thomas Starr. It is for a single claim—not for a number of claims acquired by purchase or otherwise, nor even for "claims in common," but for a "placer mining claim."

In summarizing the local rules and regulations of the mining districts of California, Nevada, Arizona, Idaho, and Oregon, there being at the time over a thousand such districts in the territory mentioned, Gregory Yale, in his work on Mining Claims and Water-rights, says:

> In lode mining the claims were usually 200 feet long on the lode; in *placers* the size depends on the character of the diggings and the amount of labor necessary to open them. In the hill diggings, where the pay dirt is reached by long tunnels, the claim is usually 100 feet wide and reaches to the middle of the hill.

Upon pp. 76 and 77 of the same work, he says:

> The extent or size and appurtenant rights of the locator are the subject of all the regulations. The dimensions of a placer claim varies in different localities and according to the character of the diggings. At the North San Juan hydraulic diggings, Nevada county, adopted in 1854, the claim was 180 by 80 feet. Gulch or ravine claims in other districts range from 100 to 250 feet in length by 50 to 100 feet in width, to the man. Creek claims about 200 feet in length extending from bank to bank. Claims on bars and flats differ from two feet in length to a

greater fixed length by 50 or more feet in width. Tunneling and shafting claims are about 100 feet in width to the main running through the hill and parallel with the commencement of the tunnel. To each company incurring the expense of running a tunnel in order to prospect the hills, a double claim has been allowed to each man engaged in the company. Claims in some districts are measured by 100 feet square.

The miners of Colorado followed in the wake of the other mining States and Territories in framing their local rules. Those of the Gregory diggings, adopted February 18th, 1860, was the model for the rest of the Territory, and those regulations gave but 100 feet.

Yale's Mining Claims and Rights, page 57.

The letter of Senator Stewart, printed as appendix 1 to 3 Wallace U. S. Reports, upon the subject of miner's local rules, shows how uniform the customs and rules of all districts were. He says:

The similarity of these rules and customs throughout the entire mining region was so great as to attain all the beneficial results of well digested general laws.

It must be clear to the Court, that local rules and customs prior to 1870, as to the size of placer claims, can be of no aid to the patent. As said before, common history and all experience show that it was impossible, under them, for a claim to consist of as much as 160 acres. There can be no presumption that such was the fact, for it would be basing a presumption upon something that experience and history shows has never existed.

The plaintiff, upon the authority of the Eureka-Richmond case, says, that if, under any possible circumstances, a patent for more than 160 acres of placer land can be valid, the law will presume that such circumstances existed.

Defendants do not combat the proposition; but they say, that plaintiff has not shown any possible circumstances under which a patent for more than that amount of placer land can be issued.

In the case relied upon, Mr. Justice Field delivering the opinion, said: "In the first place, it does not appear upon what locations the patents were issued. They may have been, and probably were, issued upon locations made under the act of 1866,

where such parallelism in the end lines of the surface locations was not required." It will be seen that the Honorable Justice in that case was able to say that under a certain law lode locations might be made without the end lines being parallel. He therefore presumed, as he had the right, that the locations were made under that law, and declared that a patent for such a location was valid.

But will plaintiff point out under what Statute or under what local rules and regulations a placer mining claim can contain more than 160 acres? Until that is done there is nothing upon which to base an assertion that a placer claim, located at any time, may contain more than 160 acres; and therefore there can be no presumption that, circumstances permitting, the issuing of the patent existed.

We respectfully submit that the patent for the above reasons is void upon its face.

IS IT VOID IF BASED UPON LOCATIONS MADE SINCE 1872?

It is a placer "claim" for which the patent is issued. It is for a *single* claim, the "claim" of Thomas Starr. The patent reads:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, the plat and field-notes of survey of *the placer mining claim of Thomas Starr*, accompanied by the certificate of the register of the land office at Fairplay, in the State of Colorado, whereby it appears that in pursuance of the said Revised Statutes of the United States, the said Thomas Starr did, on the 6th day of March, A. D. 1879, enter and pay for *said claim*, &c., being mineral entry, No. 182.

The certified copy of the application of Starr for that patent and the papers accompanying it, show that the patent is really issued for fifteen "claims" consolidated into one tract or parcel, which is called a "claim" in the patent; and that there were but one application, survey, plat, posting, publication, and a certificate by the Surveyor-General of but $500 worth of labor or improvements on the entire tract. They further show that thirteen of the locations were made since 1872.

If we are right in our construction of section 2325 of the Revised Statutes, providing for the entry and patent of mining claims, then clearly the patent being for more than twenty

acres, the size of a claim that might be located by an individual, and for more than 160 acres, the maximum of the claims in common which might be located by an association, is void for want of authority in the officer issuing it.

Since the plaintiff relied upon the patent for his title, he is bound by the recitals it contains. It recites that it is for a single mining claim, containing $164\frac{6}{10}$ acres. Where is the authority for a placer claim to contain that amount of land? The authority not only cannot be found, but such a thing is expressly prohibited by the Statutes.

Rev. Stats. U. S., Secs. 2330, 2331.

But plaintiff asserts that it was error to receive the record showing the dates and other facts connected with these locations.

This record was not introduced nor received to show fraud, or irregularity, or a non-compliance with regulations, either by the patentee or the executive officers of the Government, but simply to inform the Court as to the time when the locations of the several claims were made and the number of "claims" embraced in the description contained in the patent. Having learned these facts irrespective of fraud or irregularity in the proceedings, the Court was enabled to pass upon the validity of the patent.

That that is not error is well settled by the decisions of this Court.

In Patterson vs. Winn, *supra*, the Court (p. 385) say: "The proceedings of the Court of Franklin County on the application of Basil Jones accompany the grant;" and the Court examined the contents of the record and holds the patent valid from what is shown in this record.

The record received by the Court in the present case is of the proceedings of the tribunal authorized to act upon such, and the patent in issue is based upon this record.

In the Eureka-Richmond case, *supra*, Mr. Justice Field, in deciding whether or not a patent for a lode claim was void because the end lines of the claim were not parallel, says:

In the first place, it does not appear upon what locations the patents were issued. They may have been, and probably were, issued upon locations made under the act of 1866, where such parallelism in the end lines of the surface locations was not required.

If it had been held in that case that parallelism was essential to the validity of the patent under the act of 1872, it cannot be doubted but that the Court would have received the land office record, if offered, to show upon what location the patent was issued.

In the case at bar the record was offered and received to show upon what locations the patent was issued.

In Megerle vs. Ashe, 33 Cal., 75, the Court considers and discusses a great variety of facts *dehors* the patent permitted to be proved, that it might determine whether or not the patent was issued without authority or in violation of law.

In Shearman vs. Buick, 3 Otto, 209, evidence of this character was expressly held admissible, and the Court holds that testimony, whether parol or documentary, which shows a want of power in officers who issue a patent is admissible in an action at law to defeat a title set up under it. In such a case, say the Court, "the patent is not merely voidable, but absolutely void, and the party is not obliged to resort to a court of equity to have it so declared."

In support of the same doctrine, see Minter vs. Crommelin, 18 How., 87.

We do not review the authorities cited by plaintiff, for the simple reason that we do not take issue with them. The great majority of them sustain defendants in every position they assume. The great difficulty with plaintiff's counsel is, they seem to misunderstand the scope and reason of the position of the Honorable Court whose rulings are complained of, and they consequently set up their own men of straw to knock them down again. In nearly every one of the cases cited the attempt was made in an action of law to introduce evidence of fraud, mistake, or irregularity to invalidate a patent fair upon its face and which was issued by authority of law. They were merely voidable instruments if the facts charged were true, and to avail themselves of such facts a Court of Equity was held to be the proper forum. As said before, defendants do not controvert this doctrine.

Plaintiff urges that the affirmance of the judgment will invalidate many titles; and that if it is a case of doubtful construction the inconveniences and hardships of such a decision should be

considered. There are not so many titles of the character of the one in issue outstanding as counsel would seem to have the Court infer, for the practice of the Land Department herein condemned has not been pursued but about four years, if I read the decisions of that department correctly. But there is another consideration which in cases of doubtful construction should be more potential with the Court than that of sustaining a few outstanding titles, and that is, the repression of fraud and monopoly in the disposition of the hundreds of millions of acres of mineral lands yet unsold, and which are intended by Congress as the heritage of the hardy pioneer who faces peril and privation to possess, work and own them in good faith, and to the enrichment of the whole people.

It is well settled that Courts should always take into consideration the consequences of a particular interpretation of a statute.

U. S. *vs.* Fisher, 2 Cranch, 386.

T. M. PATTERSON,
Counsel for Defendants in Error.

Supreme Court of the United States.

THE ST. LOUIS SMELTING AND REFINING COMPANY, Pl'ff in Error, *vs.* THOMAS KEMP and WILLIAM NUTTALL, D'f'ts.	*No.* 458.
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Mr. Thurman will argue—

I.

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The interpretation or construction of the mining statutes given by the Land Department of the Government, in accordance with which the patent in controversy to Thomas Starr

was issued, is a correct interpretation or construction, and consequently that patent is valid. If so, it is in nowise affected by the testimony given to impeach it, and the court below erred in admitting that testimony, and also in charging the jury that the patent is void.

II.

But whether correct or not, that interpretation or construction by the Land Department is final and conclusive; that Department having jurisdiction to make it, and there being no provision of law for a review of its decision.

III.

But if it be not in its nature final, yet it has prevailed so long, and so many rights have become vested under it, that it may fairly be said to have become a rule of property that a court will not disturb.

IV.

But if it cannot be properly called a rule of property, yet it is a construction by the Land Department of statutes the administration of which belongs to that Department, and therefore ought not to be overturned by the courts unless it is *manifestly* wrong and works injustice. But no one can say with reason that it is manifestly wrong, or that it works injustice.

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